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### THE LAWYER'S DUTY AND POTENTIAL POWER.

The American Bar Association, after due consideration of economic and other conditions, believes it to be necessary that the compensation of Federal Judges should be increased to a living wage. This conclusion should not be merely persuasive with Congress, but should be binding. It is desired to give utterance to some sentiments inspired by this conviction.

Both for the good of the bar and the welfare of the nation, when the great organized American bar unanimously reaches a conclusion upon a governmental policy concerning the administration of justice its voice should be heard in legislative halls, both federal and state. It is possible in practice to make a condition, instead of a theory, of that sentiment. The program for achievement involves two phases.

The first is a wholesome co-operation by the lawyers in spirit and in deed as to all fixed American Bar Association policies. By this is meant a disciplined spirit enthusiastically ready to accept the majority opinion and to zealously labor for it; a sinking of the personal equation in the general welfare and a patriotic, earnest, unselfish desire to serve the nation's best interest, under the direction of the committee selected to guide the particular campaign, and to serve upon those committees when drafted. If the lawyers desire a concrete example for conviction or inspiration, let them look upon the conscious power of the small percentage of working men represented by organized labor. Some introspection and less analysis will furnish a solution of the one weakness of the American lawyers as a distinct profession.

The second is the detailed application of organized power. When a recommendation of the Bar Association has been respectfully made to a legislative body it should be

promptly carried to the people. Every lawyer should convert himself into a committee of one to make vocal the views of the organized lawyers and their mature recommendations. Upon every platform and in the daily press he should patiently explain their necessity and their merits and request, and give cogent reasons for a popular support. Lawyers have either been taking too much for granted or have been guilty of censurable indifference. If the lawyers need a concrete example, for conviction or inspiration as to this suggestion, let them consider the speaking tours of America's great War President, whose power is but the reflected will of the people of his country to whom he personally explains his policies. Public sentiment crystallizes under his compelling personality, magic earnestness and deep conviction.

Are the lawyers justified in exercising this great power? For their organized effort has the promise of being equally irresistible. An answer will be made with another question. Are the lawyers worthy and capable of advising the people? In their most sacred concerns the lawyer guides his clients. From the cradle to the grave, lawyers are ever necessary and present with the individual. Why should they not be with the whole nation of individuals? But there is another reason.

The lawyer, alone, whether judge or practitioner, is the expert in the administration of justice. He alone is responsible for its effectiveness. In the history of this country, from the very nature of things, no legislator has ever suffered because of an unsatisfactory conduct of the courts. If a concrete example, for conviction or inspiration be necessary, it is found in the factory. Is the board of directors held responsible for the effective operation of the machinery? It is the engineer and his associates. Do the directors of an expert plan, select and install the mechanical plant? It is the expert.

But there are two other and higher thoughts—thoughts that reach down into

the innermost soul of the lawyer, whose life is consecrated to his noble profession and who possesses an understanding of its splendid spirit. One is a threat, but the other is a promise.

If the lawyers do not advance in the regard and esteem of the people they will recede in character and quality. With them, as well as with all elements in creation, it is progression or regression. Progression means initiating and defending constructive measures in the interest of justice. If an example be needed, let them read and reflect upon the sarcasm of the soulful "Blind Poet." If Milton had performed no other service, mankind is his everlasting debtor for placing before the eyes of the English lawyers the satirical picture of their miserabilism in the days of their weakness. The dull soul of an indigent or avaricious bar ceased to "ground their purposes on the prudent or heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees." It will be helpful to turn from this sombre history to one of inspiration. To-day none are so honored, esteemed and respected of all their people as are England's lawyers, and to-day, England is a great, militant and cultured nation of brave men.

But, let our retrospection take a nobler and more unselfish turn. It is the call of duty, of opportunity, of the need of the people of their trained and mature minds in governmental concerns, no less than in individual enterprises, from which the true inspiration for progress and militancy should come. Faithful soldiers of the blind God-dess of Justice, their first duty is in shielding her sacred shrine, mindful ever of Webster's call to his brethren, that "Justice is the chief interest of man on earth." And, in the words of Milton, may it be said of the lawyers, "Unmoved, unshaken, unsecluded, unterrified, his loyalty he kept, his love, his zeal."

T. W. S.

## NOTES OF IMPORTANT DECISIONS.

**INCOME TAX—STOCK ISSUED ON ACCOUNT OF INCREASED VALUE OF ASSETS NOT TAXABLE AS INCOME.**—A letter of the Commissioner of Internal Revenue to Messrs. Haft, Meservy, German & Michaels, of Kansas City, construes the application of the income tax to an oil company whose property greatly increased in value by the discovery of additional oil sands. The company decided to capitalize this increased value by declaring a stock dividend, which the Commissioner rules it not taxable as income. The Commissioner says:

"Your attention is invited to § 31, added to the Act of September 8, 1916, by § 1211, Act of October 3, 1917.

"In accordance with the provisions of this section, all dividends, whether in stock or in cash, representing a distribution of earnings or profits accrued since March 1, 1913, constitute taxable income in the hands of the recipient shareholders.

"You are informed that where a corporation enters upon its books an estimated increase in the value of corporate property and assets, and capitalizes such an item by an issue of additional stock distributed as a dividend to its shareholders, the office holds that neither the entry of the item of increased value on the books of the corporation nor the receipt of the dividends by the shareholders represents an accumulation of profit or a receipt of income subject to tax."

"The Supreme Court of the United States on Jan. 7, 1918, in the case of *Towne v. Eisner*, held stock dividends not to be taxable income."

**ESTOPPEL—WITHDRAWAL BY INDEMNITY COMPANY FROM DEFENSE OF ASSURED.**—By decision in Minnesota the rule has become established that the control of defense in a suit by an employee against one insured as to recovery for accident gives to such employee a right of action against insurer. *Patterson v. Adan*, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184.

Somewhat analogous to this theory is a ruling by Illinois Supreme Court, that the measure of recovery against an indemnity company is not limited by the amount in its policy for the benefit of assured, where the company insists upon taking an appeal, and the judgment exceeding the amount of the policy is affirmed. 86 Cent. L. J. 2. This Court held that the situation justifies taxing interest on the policy's amount to final judgment against the company.

The Minnesota theory is extended in a case decided by its Supreme Court, where an in-

demnity company undertook to defend, but, because of a dispute with assured whom the company charged with seeking to aid plaintiff in a suit for recovery in a case covered by the policy, notified it it would not participate in the trial and, in fact, left it to the assured to conduct its own defense. By agreement with the plaintiff in the former suit, the insolvent assured sued the indemnity company with the employee to take proceeds of the recovery, if any. *Standard Printing Co. v. Fidelity & Deposit Co.*, 164 N. W. 1022.

The Court said: "Defendant contends that by withdrawing from the defense of the action after it had once assumed the defense, it took itself out of the rule of the Adan case. The jury found that the conduct of defendant in withdrawing from the defense was unwarranted. Our opinion is that when defendant once assumed the defense of the personal injury action, it made an election that was irrevocable except for cause, and that defendant could not by any unwarranted conduct on its part place itself in a better position than it would have been had it gone ahead with the defense it had once assumed."

Had the Adan case held that the right, under contract, to control the defence and not the actual exercise of such right, made the indemnity company liable to the judgment creditor in a personal injury action, the question of estoppel would not come in at all. But when the exercise of the right creates the liability to such a creditor, we think this means a substantial exercise of such right. Here there was no participation in the trial at all. There was preliminary investigation and retirement from the case. The plaintiff in the personal injury action was not interfered with in any way.

But, if the assured had any right to recover on its own account, it would seem it had the right to make an assignment of its right of action to a third party, and the arrangement it makes might be deemed equivalent to an assignment. In that event, it could make no difference whether the assignee came under the ruling in the Adan case or not.

**PUBLIC POLICY—RECOVERY BY PLAINTIFF NOTWITHSTANDING PARTICIPATION IN FRAUD.**—*Monroe v. Smith*, 165 N. W. 532, decided by South Dakota Supreme Court, was ruled upon the theory that though parties be *in pari delicto*, yet the principle that courts will leave them as they find them, admits an exception quite elastic in its nature.

Thus in the above case it appears that a newspaper concern conducted a campaign to

procure subscriptions by the giving of an automobile as a prize to one attaining the greatest number. As the campaign progressed and was nearing its close, two contestants were leading. The manager of the contest went to the father of one of them and told him that unless he put up \$700 for his daughter her adversary would win. He put up \$500 with the understanding that if it landed the prize the manager was to retain the money, but if she lost it was to be returned to him. Then the manager went to the husband of the other party and told him that the former party had put up \$600, and for his wife to win it was necessary to put up \$450. This he did and secured the prize on final count of the votes. The manager returned the \$500 as agreed. The husband of the winner sued to recover the \$450. This was necessary as against the \$500 provisionally put up, but unnecessary had no votes been counted in consideration of such sum. All other contestants were beaten independently of this fraudulent arrangement.

The action was dismissed by the trial court because the agreement was a fraud as against all the other contestants and payment of the \$450 being unnecessary to protect the interest of the winning contestant, it was money voluntarily paid in perpetration of a fraudulent scheme. This dismissal the Supreme Court reverses.

The Court said: "A judgment requiring defendant to refund the money paid by Monroe will tend to frustrate the commission of fraud in similar future contests, because it will deter organizations and managers of such contests from tempting contestants to enter into like dishonest schemes. Public policy will be better served by giving notice to the originator and managers of contests that such contests, although legitimate in themselves and in aid of honest business, must be honestly conducted, and that they shall not profit by working upon the cupidity of dishonest contestants. We are therefore of the opinion that upon the evidence plaintiff was entitled to a recovery."

Two well known cases are cited in support of this ruling. *Stuart v. Wright*, 147 Fed. 321, 77 C. C. A. 499; *Hobbs v. Boatright*, 195 Mo. 693, 93 S. A. 934, 5, L. R. A. (N. S.) 906, 113 Am. St. Rep. 709. These were horse racing cases where the entire scheme was illegal in its purpose and presented a clearer case of victimizing than the instant case does, which is of an unlawful arrangement within a transaction lawful in its general features. We doubt very greatly whether they support an exception to the rule invoked.

STATE QUARANTINE LAWS AND  
REGULATIONS—VALIDITY OF AS  
APPLIED TO INTERSTATE COM-  
MERCE.

In *Hannibal, etc., R. Co. v. Husen*,<sup>1</sup> plaintiff had recovered damages resulting from the communication of Texas fever to his cattle by cattle conveyed into Missouri in violation of the Missouri statute which prohibited the bringing into the State of Texas Mexican or Indian cattle during eight months of the year. This statute was held to be a burden upon interstate commerce and unconstitutional, in that it went beyond what was necessary for the protection of the state.

In *Missouri, K. & T. Ry. Co. v. Haber*,<sup>2</sup> the action was brought to recover damages by reason of the communication of Texas fever to plaintiff's cattle by cattle brought into the state by the railroad company. The action was based upon a Kansas statute which provided that it should be a misdemeanor for any person between February 1 and December 1 of any year to bring into the state any cattle capable of communicating Texas fever; that any person violating the act should be liable to the person injured by the communication of said disease, and that proof that the cattle were brought into the state from south of the 37th parallel should be taken as prima facie evidence that the act had been knowingly violated (with an exception not necessary to state). Defendant claimed that the state statute was a burden upon interstate commerce and that Congress had so acted upon the subject matter as to nullify the state legislation.

The federal act (of May 29, 1884) provided for the establishment of a Bureau of Animal Industry, charged with the duty, under the instruction of the Commissioner of Agriculture, of investigating and reporting upon (among other things) the meth-

ods of suppressing and preventing the communication of animal disease. The Commissioner of Agriculture was further required to prepare rules for the suppression, etc., of such disease and certify same to the state governors and invite their cooperation and when the state and federal authorities should agree upon plans and methods in the premises, the Commissioner of Agriculture was authorized to expend money appropriated by the act in taking such quarantine measures as might be necessary. It was further provided that no railroad company should transport in interstate commerce any live stock affected with communicable disease and that no person should knowingly deliver such live stock to any railroad company.

The Supreme Court upheld the statute. It said (p. 623):

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Further (after referring to the scope of the federal act) (p. 623):

"The act of Congress did not assume to give any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases. On the contrary it was made a misdemeanor to deliver for transportation or to transport or drive from one State to another, cattle known to be affected with contagious, infectious or communicable diseases."

And the court went on to point out that the federal act did not deal with any question of civil liability for causing damage to the owners of domestic cattle by the in-

(1) 95 U. S. 465.

(2) 169 U. S. 613.

roduction of cattle under circumstances which would violate the state statute and that neither the federal act nor any regulations established thereunder undertook to give any protection from such liability.

The cattle had been received by the initial carrier at a point outside the "infected district" as defined by the federal authorities but were by defendant carried through such district. The court said that the federal regulations may have been fully complied with but that even so no protection was afforded against the liability imposed by state law, which was in aid of the objects which Congress had in view when it passed the Animal Industry Act.

The court discussed the Husen case, *supra*, saying that the statute in that case was condemned because it went beyond the necessities of the case, while in the instant case the statute was passed by the State within the limits of what was needed for self protection, not excluding all Texas cattle but merely imposing a responsibility in damages upon one bringing in such cattle if it communicated disease. Further on the court carefully pointed out that it construed the state statute as not imposing liability if the defendant could show that he did not know that the cattle were liable to impart diseases and could not by the exercise of diligence have discovered it.

In *Rasmussen v. Idaho*,<sup>3</sup> Rasmussen was convicted under a statute of Idaho and proclamation of the Governor. The statute required the Governor whenever he should believe that scab or any other infectious disease of sheep existed in any other state to designate such localities and prohibit the importation into Idaho of sheep from such places except under such restrictions as he might deem proper. The Governor accordingly issued a proclamation forbidding for 60 days the importation of sheep from certain designated territory in Utah

and Nevada. The court upheld the conviction as against the contention that the authority therefor violated the Commerce Clause. It found the statute and proclamation to be reasonable and not subject to the objections which had led to the condemnation of the state statute in the Husen case, the Idaho statute authorizing the embargo only after investigation and the Governor having in his proclamation acted upon reasonable grounds and gone only so far as the defense of Idaho's sheep industry reasonably required. No question of federal legislation was discussed or (apparently) involved.

In *Reid v. Colorado*,<sup>4</sup> Reid was convicted under a Colorado statute which provided that it should be unlawful for any person to bring into the State any cattle or horses from a State or country south of the 36th parallel unless such cattle or horses had been held north thereof for 90 days previous to their importation into the State or unless a certificate had first been secured from the state authorities. Reid had secured a certificate from a federal inspector but had ignored and violated the state requirements.

The case involved the same provisions of the federal law (act of May 29, 1884) as have been noted in the discussion of the *Haber* case.<sup>5</sup> The Supreme Court affirmed the state court's decision upholding the conviction. It declared that any rule which Congress made was paramount and that when "the entire subject of the transportation of live stock from one state to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not," but the court declared that "Congress has not by any statute covered the whole

(3) 181 U. S. 198.

(4) 187 U. S. 137.

(5) *Supra*.

subject of the transportation of live stock among the several states and except in certain particulars not involving the present issue, has left a wide field for the exercise by the states of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases."

In support of this view, the court took up the provisions of the federal act and construed them as not evidencing any intention to prevent the state from taking measures to protect their live stock industry. In discussing these matters the court remarked (p. 148):

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'"

Referring to the provision of the federal law prohibiting any person from transporting any cattle in interstate commerce known to be affected with communicable disease, the court pointed out that this did not cover the entire subject of transporting diseased cattle in interstate commerce and left the state free to adopt and enforce further precautions of a reasonable nature such as were contained in the Colorado statute.

In *Asbell v. Kansas*,<sup>6</sup> Asbell was convicted of the violation of a Kansas statute prohibiting any person from transporting into the state cattle from any point south of the south line of the state, except for immediate slaughter, without having first caused them to be inspected by the state or federal authorities. This case brings in the

federal statutes of February 2, 1903,<sup>7</sup> and of March 3, 1905.<sup>8</sup> The court declared (Mr. Justice Moody delivering the unanimous opinion of the court) that the only parts of the said acts that need be considered were the provisions of the act of 1903. The decision (affirming the state court) will be made clear by a quotation from the opinion (pp. 257-8):

"In that law (of 1903) it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or live stock and found them free from infectious, contagious or communicable disease, 'such animals so inspected and certified may be shipped, driven, or transported \* \* \* into \* \* \* any State or territory \* \* \* without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.' There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with the national law. Rule 13, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined States, which is not this case, and that in terms it recognizes restrictions imposed by the State destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none."

The decision in this case was made in the face of the provisions of the federal law which are now to be mentioned (and which are still in force).

1. Act of 1903.—An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of

(6) 209 U. S. 251.

(7) 32 Stat. 791, 10 Fed. Stat. Anno., p. 34.

(8) 33 Stat. 1204, 10 Fed. Stat. Anno., p. 35.

Contagious and Infectious Diseases of Live Stock, and for Other Purposes.<sup>9</sup>

Section 1 confers upon the Secretary of Agriculture the powers which had been vested in the Secretary of the Treasury by sections 4 and 5 of the Act of May 29, 1884 ("to be exercised exclusively by him") in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuro-pneumonia, foot and mouth disease, and other dangerous, contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases. This section authorizes and directs the Secretary from time to time to establish such rules and regulations concerning the exportation and transportation of live stock from any place where he has reason to believe such diseases may exist into other states, etc., as he may deem necessary, and provides that such regulations shall have the force of law. It further provides that when any federal inspector shall issue a certificate that any cattle or other live stock have been inspected and found free from disease, such animals may be transported in interstate commerce without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purposes of such inspection.

Section 2 authorizes the Secretary to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of animal diseases from foreign countries, into the United States or from one state to another, and to seize and quarantine any hay, etc., or any hides, animal products, etc., coming from foreign country into the United States or from one state to another whenever he

deems advisable in order to guard against or suppress contagion.

2. Act of March 3, 1905.—An Act to Enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes.<sup>10</sup>

Section 1 authorizes and directs the Secretary to establish quarantine district and to notify carriers of and publish information as to same.

Section 2 prohibits railroad companies, etc., from receiving or transporting, persons from delivering to them, and persons from driving or transporting in private conveyance from state to state from any quarantined area, any live stock except as provided in the subsequent sections.

Section 3 requires the Secretary to make rules which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle or other live stock in interstate commerce from quarantined territory.

Section 4 provides that live stock may be moved from quarantined territory into another state under and in compliance with the regulations of the Secretary made under section 3 of the Act and prohibits any such movement of live stock in interstate commerce from quarantined areas "in manner or method or under conditions other than those prescribed by the Secretary."

Rule 13, referred to in the Asbell case, was as follows:

"Rule 13. From the 1st day of February to the 31st day of October inclusive of each year, no cattle shall be transported or driven or allowed to drift from the area quarantined by the Secretary of Agriculture for splenic fever into any State or Territory or District of Columbia or portion thereof outside of the said quarantined area, except as hereinafter provided. During the

(9) 10 Fed. Stat. Anno., p. 34.

(10) 10 Fed. Stat. Anno., p. 35.

months of January, November and December of each year cattle from the area quarantined by the Secretary of Agriculture for splenic fever may be shipped without restrictions, other than those imposed by state or territorial officers at point of destination."

The Asbell case is direct authority for the proposition that the test is whether the state action actually conflicts with or obstructs the affirmative exercise by Congress of the powers of Congress on the subject and the action of the federal authorities authorized thereby. The state is allowed to supplement the federal laws and regulations and impose additional restrictions and requirements, in the absence of express federal prohibition. This view is supported by the case of *Savage v. Jones*, to be discussed.

The Asbell case decides that notwithstanding the fact that Congress has imposed upon the Secretary of Agriculture the duty of keeping informed of his stock conditions so far as disease is concerned, and not only authorizes but requires him to establish rules and adopt measures to prevent the communication of disease, yet that Congress has not by enacting these provisions taken possession of the entire subject matter so as to exclude the state; that, notwithstanding the Secretary, under the authority of the federal statutes, may have established certain quarantine districts and made rules regulating the transportation of animals, etc., therefrom (in interstate commerce), the state may decide that territory not covered by the federal quarantine shall be quarantined so far as the state is concerned. (I am, of course, assuming that any state law or regulation is not condemned by the doctrine of the *Husen* case as being arbitrary and palpably unnecessary.) Under the doctrine of this Asbell case, the state may decide that the Secretary of Agriculture has not made rules or adopted measures which will not protect it and may therefore make its own rules and adopt its own measures; or may reach the

conclusion that the federal quarantine is not sufficiently extensive, and establish for itself additional territory which shall be considered quarantined.

What are the limits of the state's power (still assuming that the state's action is not to be condemned as arbitrary *per se*)?

If a federal inspector gives a certificate as referred to in section 1 of this Act of 1903, the state cannot prevent the introduction of the live stock or require any other inspection, because the federal act expressly says that such live stock may move without any further inspection. See the Asbell case, p. 258.

If the federal authorities under the Act of 1905 establish a quarantined area and make regulations under which live stock may move therefrom the state cannot, *as to live stock from such quarantined territory*, prohibit the importation or impose other conditions, because section 4 of the said act expressly says that such live stock may move from such quarantined territory under the regulations of the federal authorities and in no other manner.

Under the authorization of the Act of 1903, the Secretary may and is required to adopt such measures as he deems proper to prevent and suppress contagion. As we have seen, this does not prevent the state from regulating the subject matter, so long as the federal Secretary has not taken charge of the specific matter which the state is acting upon.<sup>11</sup> But the question arises, is the secretary's power limited to affirmative regulations and measures operating on the subject matter, or can he affirmatively sanction movements under his regulations or officially declare that his rules or methods are intended to cover the subject matter and are exclusive? If the federal acts confer such power upon him and he exercises it, then the power of the state is abrogated and

(11) *Reid* case; *Asbell* case. See also *Missouri Pacific R. Co. v. Larabee Mills*, 221 U. S. 612.

annulled. Can he, for example, say that the quarantine he has established is sufficient to prevent danger and that live stock may move from territory without such quarantined area without restriction of any sort? There is ground for the view that he cannot thus exclude state action in view of the decision holding that Congress did not intend to prevent state action additional to the federal measures, save in the instances where the federal acts affirmatively authorize movement under federal regulations. The Asbell opinion, however, makes a point of the fact that the regulation of the secretary "in terms recognizes instructions imposed by the state of destination."

The recent decision in *Savage v. Jones*,<sup>12</sup> is interesting in connection with the subject of these notes. The question involved in this case was whether or not an Indiana Statute violated the Commerce Clause which prohibited the sale in Indiana of feeding stuff unless there should be first filed with the State Chemist a certificate showing among other things the ingredients which the article contained and unless a label showing the analysis of the article should be affixed to the package and an inspection tax paid. The court declared that the purpose of the statute was to "prevent fraud and imposition in the sale of food for domestic animals" and that the object of the Food and Drugs Act (of June 30, 1906, 34 Stat. 768) was to prevent adulteration and misbranding. It pointed out that in the enumeration of the acts which would constitute a violation of the federal act Congress had not included the failure to disclose ingredients (save in specific instances, as where opium was present). The court defines the scope of the federal act as follows (pp. 531-2):

"It is provided that the article 'for the purposes of this act' shall be deemed to be misbranded if the package or label bear any statement, design or device regarding

it or the ingredients or substances it contains, which shall be false or misleading. (Section 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture."

The court goes on to say that Congress "has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims." It shows that Congress has not in the statute expressly denied the power of the state to "permit imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis."

In answering (in the negative) the question whether any such denial is implied, the court remarks (p. 533):

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

The court proceeds to discuss the *Haber*, *Reid*, and *Asbell* cases in support of its decision. It also cites *Northern Pacific Ry. Co. v. Washington*,<sup>13</sup> (*Hours of Service*

(12) 225 U. S. 501.

(13) 222 U. S. 370.

case), but does not undertake to reconcile it. It is interesting to compare the foregoing quotation from the *Savage* case with the following from the *Southern Ry Co. v. Indiana* (February 23, 1913):

"The test, however, is not whether the state regulation is in conflict with the details of the federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

See also the New York "Hours of Service" case;<sup>14</sup> and the *Quarantine* case.<sup>15</sup>

JOHN K. GRAVES.

Washington, D. C.

(14) *Erie R. Co. v. New York*, 233 U. S. 671.

(15) *Chicago, Burlington & Quincy R. Co. v. Frye-Bruhn Co.* (C. C. A., 8th Circuit), 184 Fed. 15, 20-22.

#### NEGLIGENCE—LAST CLEAR CHANCE.

##### AIKEN v. METCALF.

Supreme Court of Vermont. Oct. 16, 1917.

102 Atl. 330.

An instruction that although plaintiff was negligent in attempting to cross the street if defendant driver of the automobile by looking would have discovered plaintiff and been able to avoid him, plaintiff was entitled to recover was properly refused; the last clear chance doctrine not being applicable where the negligence of plaintiff is concurrent with that of defendant.

MILES, J. This is an action to recover damages for an alleged injury to the plaintiff, occasioned by the defendant's negligence in operating an automobile. The injury occurred on a street in the village of Irasburg, running northerly and southerly along the easterly side of the common in that village. At the time of the injury, the plaintiff was crossing the street diagonally on foot in a northwesterly direction, intending to cross the common in a beaten path used for that purpose, and when struck by defendant's car was west of the center of the street, which was from 25 to 35 feet wide. Just before the accident, the plaintiff came out of a store on the east side of the street, looked north

and south, saw no team, auto, or person in the street, traveled northerly on the sidewalk or platform of the store about 50 or 60 feet, and then started to cross the street as stated above, and in doing so looked neither to the north or south for approaching teams or autos, except only so far as he could see without turning his head. Just before the accident, the defendant was on the westerly side of the common, and in coming onto the street on the easterly side of the common, he first went south to the southwesterly corner of the common, then turning easterly came to the southeasterly corner of the common, where he turned northerly onto the street in which the accident occurred, about 200 feet south of where the plaintiff attempted to cross it. As he came onto that street, there was nothing to prevent his seeing the plaintiff while attempting to cross the street, if he had looked. He admitted that he did not blow the horn or give any signal, in making the sharp turns at the southwest and southeast corners of the common, and did not see the plaintiff until just before the collision, and not in season to avoid it. The plaintiff's testimony tended to show that he did not see the automobile until about the time he was struck by it, and not in time to avoid it. The case was tried by jury, and verdict and judgment were rendered for the defendant. Only two exceptions were reserved by the plaintiff, the first of which was a request to charge as follows:

"If you find the plaintiff was negligent in attempting to cross the street at the time he did, and you find the defendant, had he been looking, would have discovered the plaintiff when he had reached a place of danger and had been able to avoid him, then the plaintiff would be entitled to recover."

—which the court refused. The plaintiff based this exception upon the "last clear chance" rule and upon no other ground. There is more or less confusion, if not conflict, in the treatment of this subject by the courts in different jurisdictions; but this court is committed to the doctrine that the last clear chance rule cannot be invoked where the negligence of the plaintiff is concurrent with that of the defendant. The law on that subject, as recognized in this state, is well stated in *French v. Grand Trunk Ry. Co.*, 76 Vt. 441, 58 Atl. 722, that when a traveler has reached a point where he cannot extricate himself and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition and not the proximate cause of the injury and will not preclude a recovery, but that it is equally true that if a traveler, when he reaches the point

of collision, is in a situation to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. The rule that, if the plaintiff's negligence proximately contributes to his own injury, he cannot recover is so well settled in this state that it needs no citation of authorities upon that point, and therefore the last clear chance rule can never apply where the plaintiff's negligence is concurrent with and of the same degree as that of the defendant. A charge as requested by the plaintiff would justify the jury in finding for him, though his negligence may have proximately contributed to his own injury. That the plaintiff cannot recover when his negligence is concurrent with and of the same degree as that of the defendant is also shown in *Trow v. Vt. Central R. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191, in which the authorities upon that subject are collected and commented upon. The only case in this state in conflict with the rule laid down in *French v. Grand Trunk Ry. Co.*, supra, is *Willey v. B. & M. R. R.*, 72 Vt. 120, 47 Atl. 398. In that case *Trow v. Central Vt. R. R. Co.*, supra, is cited in support of the conclusions reached in the *Willey* Case; but, as we have seen, the *Trow* Case does not support the *Willey* Case. In the *Willey* Case the holding would permit a recovery when the negligence of the plaintiff was concurrent with that of the defendant. That case made the negligence of the defendant the controlling factor in the consideration of his liability, regardless of the plaintiff's negligence. In the *French* Case the court comments upon the *Willey* Case and, implicitly at least, overrules it. The *Willey* Case has never been relied upon by this court since it was promulgated as an authority for the law stated in the opinion. *French v. Grand Trunk R. R. Co.*, supra; *Flint's Adm'r v. Central Vt. Ry. Co.*, 82 Vt. 269, 73 Atl. 590. The *Willey* Case does not state the law as this court understands it; and, as it is sometimes referred to in briefs of attorneys, we take this occasion to expressly overrule it. There was no error in the court's refusal to charge as requested. The other exception of the plaintiff was as follows:

"The plaintiff excepts as to the charge of the court which eliminates the sounding of the horn as being a matter of negligence, because the plaintiff claims that the pathway across a highway and common was an intersection of the highway under the statute."

The plaintiff argues that this last exception is to the court's failure to charge respecting the defendant's neglect to sound the horn or

give any other signal before making the turn at the southeast corner of the common. The defendant argues that that question is not raised by the exception taken, and that the only exception saved by the plaintiff with respect to giving a signal is to the court's failure to charge that the path across the highway and common was an intersection of highways, and that it was the duty of the defendant to sound the horn on approaching that crossing. We think the exception taken was not to the court's failure to charge that it was the duty of the defendant to sound the horn on approaching the southeast corner of the common, but was to the court's failure to charge that it was the defendant's duty to sound the horn on approaching the pathway crossing. The reason stated as the ground of the exception shows that the exception related to the crossing and nothing else, and the court was justified in so understanding it.

There was no error in the court's omission to charge that the path across the highway and common was an intersection of highways within the meaning of the statute, and that it was the duty of the defendant to give a signal on approaching it; for it was not an intersection of highways, requiring the defendant to give a signal on approaching it.

Judgment affirmed.

NOTE.—*Last Clear Chance Doctrine. Where Duty to Look Would Have Avoided Injury.*—The instant case declares that: "The rule, that, if the plaintiff's negligence proximately contributes to his own injury, he cannot recover is so well settled in this state that it needs no citation of authorities upon that point, and, therefore, the last clear chance rule can never apply where the plaintiff's negligence is concurrent with and of the same degree as that of defendant." The facts in the instant case show that defendant "did not see plaintiff until just before the collision and not in season to avoid it." And the requested, but refused, instruction, injected the thought that had defendant "been looking," he would have discovered the plaintiff in time to have avoided the collision. But the court ruled, practically, that the duty to look was not equivalent to actual discovery of plaintiff being in danger.

In *Ill. Cent. R. Co. v. Evans*, 170 Ky. 536, 186 S. W. 173, Kentucky Court of Appeals, said: "It is a familiar rule and often applied in the law of negligence, that, however much the negligence of the injured party may have contributed to his injuries, this will not excuse the person injuring him, if this person, after discovering his peril, could by the exercise of ordinary care could have avoided the injury." There seems so far no essential difference between the statements by these courts. But the Kentucky court went fur-

ther and declared that the effect of a warning to the engineer that a hand car on the track by plaintiff's negligence, devolved upon the engineer the duty to ascertain the negligent plaintiff's situation so as to prevent a collision.

It is to be conceded that in some circumstances there is no obligation to keep a lookout for persons in danger, as for example, trespassers on a railroad track. But even as to these if the trespasser were in a position where his perilous position could not help from being seen, defendant injuring him will be liable. *Tenn. Central R. Co. v. Cook*, 146 Ky. 372, 142 S. W. 683, citing a number of Kentucky cases.

In *Becker v. L. & N. R. Co.*, 110 Ky. 474, 61 S. W. 997, 53 L. R. A. 267, 96 Am. St. Rep. 459, the opinion refers to *Shearman & Redfield on Negligence*, § 484, where the author in speaking of contributory negligence and last clear chance, said: "The defendant is responsible, not only for what he actually knows, but for what he is bound to know. It is clear that the frequent statement, that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'wilful' or 'wanton,' or even grossly negligent, are not sound. No courts have in actual practice adhered to this imaginary rule. It has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which had previously acted on it."

The rule as stated by Michigan Supreme Court is that: "Contributory negligence of plaintiff may not prevent a recovery in a case where the defendant, who knows or ought to know of the precedent negligence of plaintiff, does him an injury." *Davis v. Saginaw, etc., Ry. Co.*, Mich., 157 N. W. 390, citing Michigan cases.

In *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301, 45 L. R. A. (N. S.) 896, the Supreme Court of Errors reviewing the question quite fully of contributory negligence preventing recovery, held concurring negligence prevents recovery, yet upholds the principle, that if one placing himself in danger is struck by another when he might avoid striking him, this striking is open to the charge of being wilful and wanton, and therefore to be regarded as the proximate cause of the injury. The court then remarks that it has been speaking of cases where "actual knowledge on the part of the defendant of plaintiff's peril enters into the assumption of facts. Suppose, however, that such knowledge is not established, but facts are shown from which it is claimed that the defendant ought in the exercise of due care to have known of it? What shall be said of such a situation?"

It was said an engineer operating at a grade crossing is under duty to exercise caution and failure to do so produces like "effect as actual knowledge." And so "a motorman of a trolley car running in a highway, or a chauffeur driving an automobile is under a duty to be watchful for the protection of others which another man under other conditions would not owe to his fellows."

We think the reasoning in this supplies a rule which ought to be observed. If contributory or concurrent negligence places one in a situation of peril, then actual knowledge in time to avoid injuring him makes the act of defendant in injur-

ing him the proximate cause thereof, and, if the defendant owed a duty such as is spoken of in the *Nehring* case, his lack of actual knowledge will not make him less the proximate cause of injury, for which recovery should be allowed under last clear chance rule. C.

## BOOK REVIEW.

### CORPUS JURIS, VOLS. 8-12.

Five volumes of *Corpus Juris* have appeared within the last year, to-wit: volumes 8 to 12 inclusive. The superior excellence of this set is being maintained steadily and it is certain to realize the most hopeful anticipation of those who have been looking for a careful scientific arrangement of the law of the United States.

The term "*Corpus Juris*" used in this connection does not represent accurately the conception of Justinian's monumental enterprise; it could not in the nature of things. No supervisory power exists anywhere in this country which can hammer out the differences and discrepancies between the laws of different states and by a simple edict make all laws uniform.

But so far as a scientific classification can bring order out of chaos and classify the general principles of the English common law, common to all the states, this new work may justly claim no inferior position to the great code produced under the supervision of Tribonian and his celebrated collaborators. Indeed, the present work performs perfectly the function of Justinian's Digest arranging the authorities and classifying the material. And, if it is not able, by a simple edict, to iron out all the curious wrinkles and anachronisms of American Statute law, it can, at least, classify the decisions construing different statutes and codes common to most of the states and by the very force of association tend to harmonize, by such construction, even the statute law of the various states.

Volumes 8 to 12 cover all the usual subjects of law included within the two subject headings—Bills and Notes and Constitutional Law inclusive. Volume 8, with the exception of a few minor subjects, is practically a treatise on Bills and Notes, a treatise covering 1108 large pages of small type, equivalent to double the number of pages of an ordinary law book. The subject is well treated both historically and

analytically. Part IV of the article, on "Codification by the Negotiable Instruments Law," is especially valuable. The author under the sub-title "Construction" emphasizes the importance of "following harmonious decisions of courts of other states" in order to carry out the purpose of uniformity of this act—which was the first of the notable series of uniform acts, prepared by the Commissioners on Uniform State Laws.

The principal topics in Volume 9 are Bonds, Brokers, Building Contracts, Burglary and Cancellation of Instruments. Volume 10, like Volume 8, is a treatise in itself; the entire volume covers the one subject, "Carriers." It takes 1239 pages to exhaust the very important topic of the law and the work is excellently done by two of the editorial staff, Wm. A. Martin and Henry H. Skyles.

By far the two most important topics in Volume 11 are Charities and Chattel Mortgages; the latter topic requiring nearly 400 pages for its treatment. No subject of the law is growing faster than that governing chattel mortgages and the increasing litigation involving construction of such mortgages shows the fluidity of the law on this subject.

Volume 12 treats several very important subjects: Commerce, in 158 pages; Compositions with Creditors in 55 pages; Conflict of Laws in 65 pages; Conspiracy in 120 pages and Constitutional Law in 650 pages. It will strike the ordinary lawyer as being somewhat unusual to find the great and growing subject of Conflict of Laws cramped into 65 pages when ten times that number of pages should hardly suffice for a proper treatment of this subject. In Continental countries this title ranks among the most important subjects of jurisprudence and the literature it has inspired would fill libraries. Anglo-Saxon jurisprudence has not yet awakened to the importance of the questions of law arising from the conflict of laws applicable to the persons or subject matter of litigation, and most text book writers still treat the subject very superficially. The present world conflict will doubtless, among other changes, produce a more friendly interest in the laws of other countries and a serious attempt to adjust the differences between laws in the interest of justice and the more perfect freedom of international intercourse.

The mechanical execution of these volumes like those gone before, represent the highest and best in the art of printing and publishing.

The volumes are printed on bible paper, bound in buckram and published by the American Law Book Company, New York.

## HUMOR OF THE LAW.

Justice Alfred Page, of New York tells the following story:

"A resident of the Bowery took an accident insurance policy and then fell ill of pleurisy. He brought action against the insurance company and lost in the municipal court, which decided that pleurisy was not an accident, but a visitation of God. The superior court reversed the finding on the ground that a visitation of God to a resident of the Bowery was an accident."

A country lawyer was defending a prisoner who had killed a man by hitting him on the head with a brick. The case against the prisoner being quite clear, the counsel endeavored to get his client off by making a perfervid speech. He said: "The responsibility of defending my client is almost overwhelming. This morning, as I was walking in my garden enjoying the lovely sunshine and balmy air, listening to the birds singing, and looking at all the beautiful flowers, I said to myself, 'My poor client, immured in his cell, can see none of those things!'"

Just then a spectator at the back of the court shouted: "Neither can the man he hit on the head with a brick!"

They are telling this one, which may or may not be true, in the centers of civilization along the Eastern Seaboard.

A youth hired as an office boy by a New York concern was explaining to his employer the necessity of his having steady employment:

"You see," he said, "I have to help support my mother, because papa isn't with us any more."

"Is he dead?" asked the head of the concern sympathetically.

"No sir; he's not dead, but they've got him in jail."

"In jail! What for?"

"Well, sir, he used to work in a bank over in Jersey—and they accused him of taking samples home."

## WEEKLY DIGEST

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1. **Animals**—Contagious Disease.—A livery stable keeper, who took defendant's mules into his stable, not knowing that they were affected with contagious disease, defendant having represented them to be sound, may recover for injuries to his own stock, which contracted disease.—Wood v. Hill, Ga., 94 S. E. 283.

2. **Adverse Possession**—Landlord and Tenant.—Where one rents land to another such tenancy is sufficient notice of adverse possession, although he never mentioned his claim to anyone.—Salinas v. Shaw, Tex., 198 S. W. 605.

3.—**Sufficiency of.**—An instrument called a bill of bargain and sale, naming the parties, reciting that one sold to the other certain lands, describing them, for one-half the merchantable fruit on the place, the grantee to furnish the grantor's wife board and lodging during her lifetime, under which the grantee went into possession and claimed adversely, was sufficient to constitute color of title.—Baber v. Baber, Va., 94 S. E. 209.

4. **Attorney and Client**—Disbarment.—Gen. St. 1915, § 486, directing Supreme Court to disbar attorney, convicted of felony or of a misdemeanor involving moral turpitude, does not apply to a conviction before a justice of the peace.—In re Anderson, Kan., 168 Pac. 868.

5.—**Misconduct.**—Disciplinary proceeding against attorney for misconduct, on ground that, as required by federal equity rule No. 24 (198 Fed. xxiv, 115 C. C. A. xiv), he had signed petition in federal court in suit to establish

claims of heirs in land to which it had been adjudicated that they had no claim, in view of his belief in claim and the absence of fraud, dismissed.—In re Downes, N. Y., 167 N. Y. S. 588.

6.—**Relationship.**—Service of notice of motion upon plaintiff's attorney to assess damages upon an injunction bond, heard during the term in which the judgment dissolving the injunction was given, was sufficient, relation of attorney and client being presumed to exist until close of term.—Southern Surety Co. v. Young, Mo., 198 S. W. 476.

7. **Bankruptcy**—Preference.—Where bankrupt's trustee sued to set aside as preference assignment of accounts, it was not necessary to show that assignee believed preference was intended; trustee having shown preference as defined by Bankruptcy Act.—Abele v. Beacon Trust Co., Mass., 117 N. E. 833.

8. **Banks and Banking**—Liability to Depositor.—Where agent, in possession of check payable to principal's order, indorsed principal's name, without authority, and defendant bank gave him credit for it on account, and permitted him to exhaust his deposit, it was liable to principal for proceeds of check.—Hope Vacuum Cleaner Co. v. Commercial Nat. Bank of Independence, Kan., 168 Pac. 870.

9. **Bills and Notes**—Attorney Fees.—Where note provided for \$10 and 10 per cent of principal and interest as collection fee, it was not error to include stipulated attorney's fee in judgment; such stipulation not being within Rev. Laws 1910, §§ 974-976, declaring penalties and damages fixed by contracts void.—McClain v. Continental Supply Co., Okla., 168 Pac. 815.

10.—**Fraud and Misrepresentation.**—There can be no recovery upon notes in the hands of indorsee not bona fide holder, secured by fraud and misrepresentation.—Commercial Security Co. v. Main Street Pharmacy, N. C., 94 S. E. 298.

11. **Brokers**—Sub-Contract.—Where in a broker's office where defendant listed a house for sale a third party said in his presence he could furnish a buyer if the broker would split commissions, and the house was sold, such third party was not a partner of the broker, and settlement with him was not a settlement with the broker.—Home Securities Co. v. Todd, Iowa, 165 N. W. 204.

12. **Carriers of Goods**—Negligence.—Where a tank car was unloaded by removing a tap on a pipe in the bottom and opening a valve from the top of the tank, the railroad is not liable for loss of oil by reason of the valve being open when the top was removed at destination; the tank being filled by plaintiff.—Houston & T. C. R. Co. v. Oriental Oil Co., Tex., 198 S. W. 601.

13.—**Pleading and Practice.**—In action for loss of olive oil in transit, allegation of petition that "defendant wrongfully drew out the oil" did not throw upon plaintiff the burden of showing that the carrier itself drew out the oil, the petition counting on the carrier's common-law liability as an insurer.—Zerilli v. Ross, Mo., 198 S. W. 487.

14.—**Terminal Carrier.**—Where terminal carrier knew that shipper was unlikely to order disposition of shipment, its keeping of goods on

flat car at demurrage charge for 86 days was unreasonable, and after 26 days it should have unloaded goods and released car.—*Northern Pac. Ry. Co. v. Pleasant River Granite Co., Me., 102 Atl. 298.*

15. **Carriers of Passengers—Baggage.**—Pullman Company assumed duty to take care of passenger's baggage, and it was part of its duty and its porter's to restore such baggage to passenger in morning, porter having placed it in upper berth of passenger's section, or to account for it.—*Palmer v. Pullman Co., N. Y., 167 N. Y. S. 610.*

16. **Gratuitous Passage.**—Passenger, paying no fare, injured by a sudden jerk of shuttle train operated by railway company to carry its employees to and from work, held not entitled under Civ. Code 1910, § 2175, to recover because persons were occasionally carried on train without payment of fare and none was demanded.—*Carter v. Seaboard Air Line Ry., Ga., 94 S. E. 280.*

17. **Charities—Wills.**—A will giving money to a county, the county to pay interest thereon at 4 per cent to a hospital, to be used for indigent patients, is technically a donation to the county, and the interest after payment is a trust, and is therefore within Acts 1912, c. 69, permitting a county "to accept donations and trusts made for benevolent and charitable objects."—*Pirkey v. Grubb's Ex'r, Va., 94 S. E. 344.*

18. **Chattel Mortgages—Fraud.**—Where plaintiff's agent sold guano to an illiterate person, and secured his mark to a note containing a mortgage on his crop, without informing him of the mortgage, there was such fraud as would relieve him of liability under mortgage.—*Southern Fertilizer & Chemical Co. v. Carter, Ga., 94 S. E. 310.*

19. **Commerce—Bill of Lading.**—Where bill of lading shows routing to be outside of state, though points of origin and destination are within state, shipment is interstate, governed by Carmack Amendment.—*Illinois Cent. R. Co. v. Rogers & Hurdle, Miss., 76 So. 686.*

20. **Employees.**—Employee in railroad machine shop pushing a carload of lumber loaded in state for the shop, but intended for building and repairing cars to be used partly in interstate traffic, was not engaged in interstate commerce within Workmen's Compensation Act, § 52.—*Barnett v. Coal & Coke Ry. Co., W. Va., 94 S. E. 150.*

21. **Constitutional Law.**—Laws 1915, c. 283, requiring Public Utilities Commission to require interstate railroads to stop all passenger trains reasonable time at or near state line, undertakes to regulate interstate commerce in a matter already regulated by federal authority, and is unconstitutional.—*State v. Dickinson, Kan., 168 Pac. 838.*

22. **Criminal Law.**—Defendant could not defeat a prosecution under Rev. St. 1909, § 651, for alleged illegal sale of colored oleomargarine, on the theory that it was engaged in interstate commerce in making the sale, where its warehouses were in East St. Louis, Ill., and it made the sale in St. Louis, Mo.—*State v. Swift & Co., Mo., 198 S. W. 457.*

23. **Contracts—Pleading and Practice.**—Plaintiff's petition alleging defendants' breach of contract, whereby he was to be paid \$1 per thousand feet for all lumber and ties cut from lands of defendants, and to have absolute control of operations of sawmills and disposition of lumber, held to state a cause of action.—*Cochran v. Stephens, Ga., 94 S. E. 303.*

24. **Unilateral Contract.**—Agreement by defendant with G, his daughter's future husband, to pay money annually to the daughter held unilateral and not binding until the marriage, though G remained willing to marry.—*De Cicco v. Schweizer, N. Y., 117 N. E. 807.*

25. **Corporations—By-Laws.**—By-laws to effect that all contracts, etc., should be signed by president "or secretary," contained no authority to secretary to indorse checks, testimony being uncontradicted that provision, with words "or secretary" stricken, were the by-laws of company.—*McCabe Hanger Mfg. Co. v. Chelsea Exchange Bank, N. Y., 167 N. Y. S. 580.*

26. **Intervention.**—Where, on petition of trustee, who intervened in suit for injunction against corporation, mortgage was foreclosed, entire property sold, and proceeds distributed, stockholders, who were not creditors, cannot intervene, setting up a new cause of action against corporate directors for their misfeasance, etc., in office.—*Central Bank & Trust Corp. v. Piedmont Portland Cement Co., Ga., 94 S. E. 308.*

27. **Promoter.**—Where promoter of corporation without authority conveyed property designed for corporation and purchase of which corporation ratified, purchaser stands in promoter's shoes, and corporation may recover property.—*Lake Harriet State Bank v. Venie, Minn., 165 N. W. 225.*

28. **Damages—Estimation of.**—The owner of an automobile used only for pleasure can recover no damages for the loss of the use of his car caused by defendant's negligence, there being no basis for ascertaining the damage.—*Hunter v. Quaintance, Colo., 168 Pac. 918.*

29. **Death—Pleading and Practice.**—Complaint alleging negligence in landlord's performance of contract to keep leased premises heated, causing the death of tenant, though based on contract, stated a cause of action for damages for tenant's death by wrongful act, within Gen. St. 1913, § 8175.—*Keiper v. Anderson, Minn., 165 N. W. 237.*

30. **Divorce—Alimony.**—Under terms of original judgment and decree of trial court, absence from the jurisdiction of wife to whom alimony had been awarded on a divorce, did not excuse husband from payments of installments of alimony falling due during her absence.—*Stanfield v. Stanfield, Okla., 168 Pac. 912.*

31. **Contempt.**—Application to punish husband for contempt in failing to pay alimony pendente lite, awarded in wife's suit for separation, was not special proceeding but motion in action, and covered by previous orders of court fixing counsel fees husband was to pay for wife.—*Turner v. Woolworth, N. Y., 117 N. E. 814.*

32. **Electricity—Res Ipsa Loquitur.**—An electric company was prima facie negligent in having a dangerous current escape down a guy wire, which had no current breaker or insula-

tor, by reason of which plaintiff was injured.—*Faris v. Lawrence County Water, Light & Cold Storage Co., Mo.*, 198 S. W. 449.

33.—**Warning.**—Where deceased was warned not to get near wires, and told how to avoid them, and would not have been injured if he had heeded instructions, held, that there could be no recovery for his death.—*Murphy v. City of Charlotte, N. C.*, 94 S. E. 299.

34. **Eminent Domain.**—**Condemnation Proceedings.**—Where mayor and councilmen passed an ordinance to condemn property for widening street, and thereafter repealed it and passed new ordinance to comply with later statutory amendments, condemnation proceeding would be regarded as an entirety.—*De Priest v. Camp, Kan.*, 168 Pac. 872.

35. **Fixtures.**—**Installation of Machinery.**—In case where insolvent company installed machinery on premises purchased under contract later forfeited, they thereafter occupying as tenant, held that machinery did not pass to vendor on forfeiture.—*Fehleisen v. Quinn, Iowa*, 165 N. W. 213.

36.—**Removability.**—Water mains, laid by city through lands under lease silent as to right of removal and laid for city's use in operating its waterworks, were in nature of trade fixtures, removable at any time without consent of landowners.—*City of Gainesville v. Dunlap, Ga.*, 94 S. E. 247.

37. **Fraudulent Conveyances.**—**Conveyance to Relative.**—Where a widowed property owner, in ill health and indebted, conveyed her entire estate to her daughter in consideration of future care and support, and the consideration was actually furnished in good faith, the conveyance was valid.—*Merithew v. Ellis, Me.*, 102 Atl. 301.

38. **Gifts.**—**Completion.**—An instrument, directing part payment of a judgment to a designated party, being a bill of exchange under Negotiable Instruments Law (Code 1904, § 2841a, cl. 126, 127), the delivery thereof did not complete a gift of judgment fund.—*Gardner v. Moore's Adm'r, Va.*, 94 S. E. 162.

39. **Homestead.**—**Claim of Homestead Rights.**—Where plaintiff ceased to occupy her homestead for 16 consecutive months, and failed to file with register of deeds a notice claiming homestead rights in described premises, as required by Gen. St. 1913, § 6963, she would be deemed to have abandoned the homestead.—*Hall v. Holland, Minn.*, 165 N. W. 235.

40. **Husband and Wife.**—**Adverse Possession.**—Where the husband acquired title by inheritance from his mother, and deeded the land to his wife, who made no adverse claim to it, and the possession did not change in fact, his continued possession after the wife's death will be deemed to be under the record title, and not under the wife's alleged adverse possession.—*Evans v. Russ, Ark.*, 198 S. W. 518.

41.—**Alienation of Affections.**—Because a father influencing his son in relation to his wife is exonerated, if the advice is in good faith, though foolish, a greater degree of proof is required to sustain an action for alienation of the husband's affections by his father than were the alienation by another.—*Moir v. Moir, Iowa*, 165 N. W. 221.

42. **Insurance.**—**Bad Faith.**—Where insured made no written application or voluntary representations as to ownership other than that there was vendor's lien on property, held, he could not be said to have acted in bad faith, within provision of policy that it should be void in such cases, if interest of insured was other than unconditional or sole.—*Germania Fire Ins. Co. v. Nickell, Ky.*, 198 S. W. 534.

43.—**Benefit Society.**—**Local council of mutual benefit society authorized to waive warranties of insurance contracts, which receives member's assessments knowing his habits as to use of intoxicants, waives warranties as to such use.**—*National Council and Ladies of Security v. Towler, Okla.*, 168 Pac. 914.

44.—**Breach of Warranty.**—That insured had changed his name to the name in which the policy was issued was not a defense to beneficiary's action on the policy, as it did not constitute a breach of warranty, as provided for in the policy.—*Modern Brotherhood of America v. White, Okla.*, 168 Pac. 794.

45.—**Fraternal Society.**—Where members of local lodge of fraternal beneficiary association voluntarily formed club to protect themselves against suspension for nonpayment of dues, etc., reliance on its action would not excuse member's default in assessments.—*Anderson v. Knights and Ladies of Security, Kan.*, 168 Pac. 842.

46.—**Indemnity.**—**Policy agreeing without exception to indemnify insured against loss from use of his automobile does not furnish security for loss while the car was operated by a minor under 18 with consent of insured in violation of a state law.**—*Messersmith v. American Fidelity Co., N. Y.*, 167 N. Y. S. 579.

47.—**Interpleader.**—Where premium on life policy was paid by third person, and, under policy, benefit was payable to him, and administrator and others garnished insurance company, which petitioned for interpleader and enjoined the garnishments, and all garnishments, except that by administrator, were dismissed, dissolution of injunction, except as to him, was proper.—*Chance v. Metropolitan Life Ins. Co., Ga.*, 94 S. E. 239.

48.—**Reinsurance.**—**Life insurance company, agreeing to reinsure, had no legal right to increase holder's annual premium, and holder had right to stand on his original contract.**—*Federal Life Ins. Co. v. Maxam, Ind.*, 117 N. E. 801.

49. **Intoxicating Liquors.**—**Indictment and Information.**—An indictment charging that defendant within a year prior to finding the indictment unlawfully had in his possession two quarts of whiskey is bad; such act not having been an offense till three months before the finding of the indictment.—*Blair v. Commonwealth, Va.*, 94 S. E. 135.

50.—**Statutory Construction.**—Though Rev. Laws, c. 100, § 1, makes it crime for person to sell, expose, or keep for sale intoxicants, unless duly licensed, and complaint charged defendant exposed and kept intoxicants for sale, proof of keeping with intent to sell sustained conviction.—*Commonwealth v. Ahern, Mass.*, 117 N. E. 827.

51. **Landlord and Tenant.**—**Respondent Superior.**—Where accident to employee of tenant of part of building did not happen on premises demised, covenant of lease that landlord should not be liable for injury to any person on premises did not prevent tenant's employee from recovering against landlord.—*Maran v. Peabody, Mass.*, 117 N. E. 847.

52.—**Trade Fixtures.**—**Lease of land and sawmill plant together with cars, engines, machinery, and apparatus of every kind and character then or thereafter placed on real estate held to entitle lessee to all personal property on premises necessary to operation of plant, but not to supplies in store, horses, food, medicines, etc.**—*Virginia Lumber & Extract Co. v. O. D. McHenry Lumber Co., Va.*, 94 S. E. 173.

53. **Larceny.**—**Ballee.**—Where a servant directed to transport sacks of grain purchased by his employer unloaded all save two of the sacks

when he reached the employer's barn and those he carried away with intent to deprive the owner, the servant is guilty of larceny and not embezzlement.—*Hatcher v. State, Fla.*, 76 So. 694.

54. **Libel and Slander**—Misconduct in Office.—Newspaper article, charging that plaintiff as county attorney stated to court that applicant for parole was first offender contrary to the fact, and should be granted a parole, at solicitation of applicant's attorneys and in subservience to them, charged misconduct in office, and was libelous.—*Carver v. Greason, Kan.*, 168 Pac. 869.

55. **License**—Constitutional Law.—Imposition of occupation taxes on blacksmiths by municipality does not violate constitutional provision requiring uniformity, because other businesses, such as hotels, were not taxed.—*O'Neal v. Town of Siloam, Ga.*, 94 S. E. 238.

56.—Notice.—An employee of a company operating auto stages was charged with notice that the vehicles were not licensed as auto stages where the vehicles carried "for hire" signs.—*State v. Ferry Line Auto Bus Co., Wash.*, 168 Pac. 893.

57. **Literary Property**—Addressee of Letter.—The writer and addressee of letters together had the whole right of property, and right of possession as against one obtaining possession thereof surreptitiously and clandestinely.—*King v. King, Wyo.*, 168 Pac. 730.

58. **Logs and Logging**—Common Law Lien.—Common law lien of owner of sawmill for contract price of manufacturing timber into lumber was not lost or waived by permitting owner's agent to take lumber from dock where it was placed as sawed and putting it upon stick in yard, even as against purchaser from such owner.—*Keystone Mfg. Co. v. Close, W. Va.*, 94 S. E. 132.

59. **Mandamus**—Removal of Obstruction.—Mandamus lies to compel a municipal council to remove such obstructions from the streets and alleys of the city as constitute public nuisances.—*Harman v. City of Parsons, W. Va.*, 94 S. E. 135.

60. **Master and Servant**—Accidental Injury.—Where lifting of a can of paint caused a blood vessel in a servant's lungs to burst, there was an "accidental injury" within the meaning of the Workmen's Compensation Act.—*Southwestern Surety Ins. Co. v. Owens, Tex.*, 198 S. W. 662.

61.—Burden of Proof.—Where servant is employed to work on scaffold, and without his fault it collapses and causes personal injury, burden is on master to show that scaffold was carefully constructed and reasonably safe.—*White v. Maison Blanche Co., La.*, 76 So. 708.

62.—Burden of Proof.—A master who has elected to reject the Workmen's Compensation Law is presumed negligent, and where it is shown that injury could have been caused by negligent act of employer, burden is on him to show that it did not.—*Mitchell v. Des Moines Coal Co., Iowa*, 165 N. W. 13.

63.—Independent Contractor.—One employed to cut wood by the cord, where there was no agreement as to hours or method of work, was an independent contractor, and the son was not an employee within the Workmen's Compensation Act.—*Fidelity & Deposit Co. of Maryland v. Brush, Cal.*, 168 Pac. 890.

64.—Jury Question.—On conflicting evidence, question whether boy who threw bundle of newspapers from truck delivering to dealers, hitting plaintiff's intestate, stood in the relation of employee to defendant newspaper publisher, or to the truck owner, held a question for the jury.—*Alexander v. Star-Chronicle Pub. Co., Mo.*, 198 S. W. 467.

65.—Public Officer.—Chief of city fire department and driver of his automobile, being in discharge of their respective duties when car struck plaintiff, were public officers, and, not being servants of municipality, were not fellow servants.—*Skerry v. Rich, Mass.*, 117 N. E. 824.

66.—Respondent Superior.—A railroad owes to a carpenter, who fell off of a bridge because the head of a spike which he was attempting to pull broke off, no duty not to use secondhand spikes.—*Texas & P. Ry. Co. v. Jones, Tex.*, 198 S. W. 598.

67.—Voluntary Service.—That son of owner of automobile, of his own initiative, accepted invitation from borrower and operated it part of the time, including time when injury was negligently caused, did not render owner liable for injury.—*Halverson v. Blosser, Kan.*, 168 Pac. 863.

68.—Workmen's Compensation Act.—Workmen's Compensation Law, § 17, as amended by Laws 1916, c. 622, § 5, as to compensation to alien non-resident defendants, does not grant compensation, but limits grants otherwise made.—*State Industrial Commission v. McCormick, N. Y.*, 167 N. Y. S. 564.

69.—Workmen's Compensation Act.—Common public dirt road held not "structure" within Workmen's Compensation Act 1913, § 3, par. B.—*McLaughlin v. Industrial Board of Illinois, Ill.*, 117 N. E. 819.

70.—Workmen's Compensation Act.—Employee killed while engaged in work of dynamiting stumps on township road held under evidence not an "employee" within Workmen's Compensation Act 1913, § 5, such employment being casual.—*McLaughlin v. Industrial Board of Illinois, Ill.*, 117 N. E. 819.

71.—Workmen's Compensation Act.—Workmen's Compensation Act being limited to injuries occurring on, in, or about factory or other designated establishment, does not authorize recovery against owner of a packing house on account of injuries received by a truck driver while making deliveries to customers.—*Hicks v. Swift & Co., Kan.*, 168 Pac. 906.

72. **Mines and Minerals**—Quiet Enjoyment.—In suit for breach of covenant for quiet enjoyment by lessee of oil lands, where complaint set up paramount title, and lack of title or right of possession on lessor's part, allegation of demand on lessor for possession was unnecessary.—*Allan v. Guaranty Oil Co., Cal.*, 168 Pac. 884.

73. **Mortgages**—Advertisement of Sale.—Where mortgage required advertisement in designated newspaper once for four weeks before foreclosure sale, publication of an advertisement in designated paper once a week for four weeks immediately preceding day of sale is sufficient, though 28 days did not elapse between first publication and sale.—*Carter v. Copeland, Ga.*, 94 S. E. 225.

74.—Priority.—Whether affidavit, sworn to but not acknowledged, that mortgage was intended to have been a first lien and to have been recorded before instead of after another, was recordable under Gen. St. 1915, § 2063, it could not as to stranger change priority of liens already fixed by record.—*Detmer v. Salinger, Kan.*, 168 Pac. 844.

75.—Redemption.—Though the second mortgagee had taken possession of the premises, the first mortgagee had title and could assume possession, so that when he leased the premises to the wife of the mortgagor without objection from the mortgagor, he took possession and was entitled to the rents and profits, subject to account therefor in case of redemption.—*American Agr. Chemical Co. v. Walton, Me.*, 102 Atl. 297.

76. **Municipal Corporations**—Assessment.—Where for street work city assesses abutting owners alone instead of including adjacent owners as required by law, remediable as to complaining abutting owner, he cannot urge that the assessment is void because other owners did not have proper notice, especially where only objection made on hearing before city council was as to amount of his assessment.—*Burroughs v. City of Keokuk, Iowa*, 165 N. W. 83.

77.—Authority of Officer.—A building committee of commissioners of a city as trustee, whose powers are "to examine into the report upon the expediency of erecting buildings, exhibit plans," etc., did not have power to bind the commissioners for services of an architect,

where another by-law created the office of architect.—*Barnett v. City of St. Louis, Mo.*, 198 S. W. 452.

78.—**Bonded Indebtedness.**—Waterworks bonds issued under Laws 1908, c. 33, constitute a bonded indebtedness of city within Gen. St. 1915, § 1422, prohibiting cities of first class from issuing bonds in excess of 5 per cent of assessed valuation of taxable property.—*State v. Kansas City, Kan.*, 168 Pac. 907.

79.—**Contract.**—Under a contract to buy sewer bonds if "legal to the satisfaction of our counsel," the bonds may be rejected and earnest money recovered, if the attorney gives his opinion that they are not legal, in the absence of fraud or bad faith, whether they are in fact legal or not.—*United States Trust Co. v. Incorporated Town of Guthrie Center, Iowa*, 165 N. W. 138.

80.—**Negligence.**—Digging of drainage trench in snow and ice along curb in public street in spring of year, to give escape for melted snow and leaving same unguarded, does not amount to negligence on part of municipality.—*Dorgan v. City of St. Paul, Minn.*, 165 N. W. 131.

81.—**Nuisance.**—Maintenance of retaining wall and ornamental posts between a lawn strip and a sidewalk to prevent earth from sliding down upon sidewalk does not so obstruct public travel on street as to constitute a public nuisance.—*Harman v. City of Parsons, W. Va.*, 94 S. E. 135.

82.—**Public Use.**—Where water pipes were acquired and held for special nongovernmental purpose, the city, when it had no further use for them, could lawfully convert them to another use or dispose of them.—*City of Gainesville v. Dunlap, Ga.*, 94 S. E. 247.

83.—**Names.**—Change of.—One may lawfully change his name without resort to legal proceedings, and for all purposes the name so assumed will constitute his legal name as if he had borne it from birth.—*Modern Brotherhood of America v. White, Okla.*, 168 Pac. 794.

84.—**Negligence.**—Implied invitation.—If there was implied invitation to truckman from defendant to enter defendant's cellar to deliver barrel of merchandise, there was no invitation afterwards to go about in darkened cellar to find clerk or short cut to store above.—*Scanlon v. United Cigar Stores Co., Mass.*, 117 N. E. 840.

85.—**Pleading and Practice.**—Power of Attorney.—Rule that power of attorney should be construed strictly to exclude authority, applies to unambiguous instrument, but not to one capable of two meanings, on one of which agent acts; especially where rights of third person would be affected, and principal is bonding company.—*German-American Mercantile Bank v. Illinois Surety Co., Wash.*, 168 Pac. 772.

86.—**Principal and Agent.**—Master and Servant.—Porter of Pullman Company, who placed passenger's baggage in upper berth of section for safekeeping during night, was authorized to bind company by statements to passenger in morning as to what he had done with a part of the baggage which was lost.—*Palmer v. Pullman Co., N. Y.*, 167 N. Y. S. 610.

87.—**Sales.**—Consummation.—Where a merchant in St. Louis, Mo., telephoned his order to a warehouse at East St. Louis, Ill., for goods to be delivered in wagons of the seller, at a price including cost of goods and delivery, the sale was not consummated and the title did not pass until delivery.—*State v. Swift & Co., Mo.*, 198 S. W. 457.

88.—**Manufactured Goods.**—Contract of owner to "sell" lumber, requiring him to manufacture lumber and load it "as sales can be made, under which other party is to advance manufacturing cost, market the lumber, and account for proceeds, less a commission, created an agency to sell, and not relation of vendor or purchaser.—*Salisbury v. Brooks, W. Va.*, 94 S. E. 117.

89.—**Waiver.**—Though plaintiff, in ordering machinery, waived notice of an acceptance of

his order, defendant did not have an unlimited time in which to accept it by performance, but was bound to accept within a reasonable time.—*Williams v. Emerson-Brantingham Implement Co., Mo.*, 198 S. W. 425.

90.—**Sunday.**—Unlawful Sales.—Sale of soft drinks as Coca-Cola held not part of restaurant business, and in violation of an ordinance substantially in the terms of Acts 1916, c. 435, re-enacting Code 1904, § 3799, and prohibiting labor on Sunday.—*Ellis v. Town of Covington, Va.*, 94 S. E. 154.

91.—**Trespass.**—Honest Mistake.—Where the supervisors ordered a survey for locating telephone poles, and the engineer made it, locating the poles, as he thought, in the highway, and they were placed as he directed, the company was not a trespasser, if, in obeying his orders, and through his honest mistake, the poles were placed on plaintiffs' land.—*Brammer v. Iowa Telephone Co., Iowa*, 165 N. W. 117.

92.—**Trust.**—Party in Interest.—Trustee, with whom lease was made, with whom negotiations were had by lessor and to whom assignments of rights of beneficiaries were made, was real party in interest authorized to sue for lessor's breach of covenant for quiet enjoyment, under Code Civ. Proc. § 369.—*Allan v. Guaranty Oil Co., Cal.*, 168 Pac. 884.

93.—**Vendor and Purchaser.**—Exchange.—Where a vendor agreed to exchange at the price he paid for land, and a written contract was had at \$125 per acre, when in fact vendor had only paid \$80, and prior to consummation of transaction the purchaser learned the truth, but exchanged deeds, nevertheless, reciting the written agreement, he ratified it.—*Scott v. Simons, Iowa*, 165 N. W. 161.

94.—**Parol Agreement.**—Where widow and children agreed to parol division of land, and widow, after 38 years' possession, applied for year's support, purchaser of land set apart to her by regular judgment in bona fide possession without notice of partition had legal title superior to that of children or their heirs.—*Riddle v. Shoupe, Ga.*, 94 S. E. 236.

95.—**Waters and Water Courses.**—Ambiguity in Decree.—In determining whether each of ditches taking supply from a creek through dry channel and diverted therefrom at different places where remainder of each ditch leaves common channel are each district entities with priorities accordingly, where there is any ambiguity in decree Supreme Court can consider the statements of claim, surrounding circumstances, etc.—*North Boulder Farmers' Ditch Co. v. Leggett Ditch & Reservoir Co., Colo.*, 168 Pac. 742.

96.—**Surface Water.**—Surface waters, flowing into natural basin from which they normally disappeared through evaporation or percolation, held not to lose their character as surface waters by being ponded in such basin.—*Thompson v. Andrews, S. D.*, 165 N. W. 9.

97.—**Wills.**—Contract for Devise.—Fromisee in contract to devise property may act upon promisor's repudiation and sue at once to protect his rights, or may delay suit until promisor's death vests in him rights secured by contract.—*Wold v. Wold, Minn.*, 165 N. W. 229.

98.—**Issue.**—"Issue," used in will, ordinarily means all lineal descendants, and unless circumstances manifest testamentary purpose to attribute to word signification other than common one, it will be construed as including lineal descendants.—*Welch v. Colt, Mass.*, 117 N. E. 834.

99.—**Pleading and Practice.**—Where a party petitioned for leave to appeal from a decree of probate, and motion to dismiss the appeal was made, the allegations of the petitions for the appeal must be taken as true, and a mere denial of the truth of its allegation is not a reason for dismissing it.—*In re Ellis, Me.*, 102 Atl. 291.

100.—**Presumption of Insanity.**—Successive adjudications by foreign state that testator was insane and later became sane created rebuttable presumptions of insanity between two adjudications, and of sanity after second adjudication.—*In re Baker's Estate, Cal.*, 168 Pac. 881.